In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 859

HISTORIC SMITHVILLE INN AND QUAIL HILL,
PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 15–22) is reported at 414 F. 2d 1358. The Board's decision and order (R. 45–46)[1] are reported at 169 NLRB No. 23.

JURISDICTION

The judgment of the court of appeals was entered on August 18, 1969 (Pet. 1). The petition for a writ

[1] "R." references are to portions of the record printed in the appendix to the briefs in the court below. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

371-448—69

of certiorari was filed on November 17, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

1. Whether substantial evidence supports the finding of the National Labor Relations Board that the employer discharged an employee because of her union activities, in violation of Section 8(a)(3) and (1) of the National Labor Relations Act.

2. Whether the Board properly found that the employer's poll of its employees tended to restrain the exercise of their organizational rights, in violation of Section 8(a)(1) of the National Labor Relations Act.

STATUTE INVOLVED

The relevant portions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth in Appendix B to the petition, pp. 13–14.

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

1. THE DISCHARGE OF MARGARET JACKSON

Margaret Jackson had worked for the Company [2] as a waitress for more than five years prior to her discharge on December 3, 1966 (R. 26; 97). Although she had been chronically late in reporting for work for at least three years, her tardiness did not increase

[2] "The Company" refers to petitioners Smithville Inn and Quail Hill, which are in the business of operating restaurants in Smithville, New Jersey, and which, although separately incorporated, constitute a single integrated business enterprise (R. 8).

during the period preceding her dismissal, and the Company admittedly considered her one of the better waitresses (R. 28, 33; 114, 115–117, 221, 235).[3] At no time was she threatened with discharge should she continue to be late (R. 28; 116).

On November 28, 1966, some of the Company's employees, including Jackson, met with Union[4] representatives to plan a campaign to organize the Company's employees. On Wednesday, November 30, Jackson began distributing authorization cards at the Smithville Inn (R. 26; 62–72; 97–101). That evening, assistant chef Hand searched her apron pockets for authorization cards (R. 27; 104–105, 109). Later that same evening, dining room manager Gruhle told Jackson that Inn co-owner Mrs. Noyes was "very upset" because cards had been passed out at work (R. 26; 104).

Commencing on November 30, and continuing every night thereafter until December 7, the Union held meetings for Company employees at Jo-Jo's Bar and The Beachcomber, establishments located near the Company's restaurants (R. 9–10; 68–74). Jackson attended all these meetings, and her presence was observed by several Company supervisors (R. 27; 106

[3] Jackson's lateness was caused by problems relating to care of her asthmatic daughter. Although Jackson asked that she be transfered to a position where her lateness would matter less, she was kept at one of the most active positions (R. 28, 33; 114–116, 235).

[4] Hotel, Motel and Restaurant Employees Union, Local 508, AFL–CIO.

109, 188).[5] On November 30, when Jackson emerged from the union meeting held in the poolroom at Jo-Jo's, she sat down at the bar next to kitchen manager Dominico. He told Jackson that Inn co-owner Mrs. Noyes had sent him over to find out who the chief union organizers were, and he also asked whether she had signed a card (R. 16–17; 106–107). During the December 1 union meeting, Jackson introduced assistant chef Hand to Union president Timperio, a fact which Hand immediately reported to his superior (R. 27; 111).

Jackson did not work on Thursday or Friday, December 1 and 2. When she reported for work on Saturday, December 3, she was discharged, assertedly because of lateness. Although the Company usually allowed a discharged employee to finish out the work week, which ended on Sunday night, the Company did not permit Jackson to work either Saturday or Sunday (R. 34; 111–113).

2. THE QUESTIONNAIRE

Meanwhile, on December 2, the Union, claiming to represent a majority of the Company's employees, had requested recognition as their bargaining representative. The Company refused, and, on December 7, the Union called a strike (R. 8–9; 392–393, 137, 142). On about December 18, the Company distributed to each employee a questionnaire asking whether he

[5] The Board's finding that the Company's surveillance of these union meetings violated Section 8(a)(1) of the Act (R. 9–16) was affirmed by the court of appeals (Pet. 19). As the petition does not appear to raise this issue (see Pet. 2), the facts underlying the surveillance finding are not detailed here.

preferred, as did his employer, a secret election to determine whether the employees "want or do not want a union," or whether he preferred "a show of union application cards to some impartial third party." Although indicating that he was free not to do so, the questionnaire further requested the employee to sign it and place his initials in the box indicating his choice. (R. 391.)[6]

B. THE BOARD AND COURT DECISIONS

On the basis of the foregoing evidence, the Board found that the Company discharged Margaret Jackson because of her union activities, in violation of Section 8(a)(3) and (1) of the Act (R. 38–39). It further found that the Company's December 18 questionnaire tended to restrain employees in the exercise of their Section 7 rights, in violation of Section 8(a)(1), because (although the purpose of the poll was not clearly explained) the employees were asked to reveal their identity, no clear and specific assurances against reprisals were given, and the poll immediately followed the employer's other unfair labor practices. (R. 24–26.) The Board ordered the Company to cease and desist from the unfair labor practices found, and from interfering in any other manner with the Section 7 rights of its employees. Affirmatively, it ordered the Company to reinstate employee Jackson and make her whole for any loss of earnings she may have suffered as a result of the discharge, and to post the usual notices. (R. 40–42, 45–46.)

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[6] The entire text of the questionnaire is set out at R. 391, and in the court of appeals' opinion, Pet. 17–18, n. 5.

The court of appeals held that substantial evidence supported the Board's findings that the Company discharged employee Jackson because of her union activities, and that the December 18 poll tended to restrain employees in the exercise of their Section 7 rights (Pet. 20–22).[7] Accordingly, it enforced the Board's order in full (Pet. 22).

ARGUMENT

1. The Company's challenge to the Board's discriminatory discharge finding raises only factual issues which do not warrant review by this Court. *Universal Camera Corp. v. National Labor Relations Board,* 340 U.S. 474, 491. In any event, the facts summarized in the Statement (*supra,* pp. 2–4), and in the court of appeals' opinion (Pet. 20–21, n. 8), show that the Board's findings and conclusions are amply supported by the record.

2. Likewise without merit is the Company's challenge to the Board's conclusion that the December 18 questionnaire violated Section 8(a)(1) of the Act. As the court below properly concluded, the Board reasonably found that the poll was coercive in light of the facts that it "was taken against a background of unfair labor practices in the form of surveillance and the discharge of an employee because of union activity," that it "clearly sought employee identification, both by signature at the end and by initials in the box indicating the alternative chosen," and that "inadequate assurances against reprisals were given" (Pet. 22).

[7] See also n. 5, *supra.*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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